

395-A.² ACA proposed that this relief should apply to cable companies serving fewer than 15,000 subscribers. In the alternative, ACA proposed that this relief apply to cable employment units with 10 or fewer employees.³

These Reply Comments will revisit an important issue addressed in ACA's Comments: the need to lessen the burdens imposed on small cable businesses by EEO outreach, recordkeeping, and reporting requirements. These Reply Comments will also respond to the National Organization for Women, *et. al.*'s ("NOW, *et. al.*") analysis of the Second Circuit's holding in *United Church of Christ*,⁴ and of Section 634 of the Communications Act as applied to this rulemaking.

II. Cable companies serving under 15,000 subscribers need relief from the administrative and regulatory burdens imposed by the EEO rules

The record before the Commission in this proceeding, and in previous dockets, provides ample support for granting relief to small cable companies under the EEO rules. Congress and the Commission have consistently expressed special concern for small cable systems and the public interest in a viable small cable sector. The 1992 Cable Act and the 1996 Telecommunications Act both contain Congress' express recognition of this public interest through inclusion of specific small cable provisions.⁵ Likewise, extensive Commission action has demonstrated the importance to the public

² *ACA Comments* at 2.

³ *Id.*

⁴ *Office of Communications of the United Church of Christ v. FCC*, 560 F2d. 529 (2d Cir. 1977).

⁵ See, e.g., 47 USC § 543(i) ("In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."); Section 301(c) 1996 Telecommunications Act (providing greater deregulation for small systems), codified at 47 USC § 543(m).

interest of maintaining viable smaller cable companies and the need to provide regulatory relief to further this public interest.⁶

Smaller companies often serve rural communities and smaller markets, and usually have extremely limited financial and administrative resources.⁷ For many smaller companies, compliance with EEO outreach, recordkeeping, and reporting requirements imposes substantial administrative burdens and costs, and drains scarce resources from already lean budgets and staff.

In its *Small System Order*, the Commission analyzed the economic, physical, and financial characteristics of cable systems above and below 15,000 subscribers and determined that there were significant differences between these two groups, while finding that systems serving under 15,000 subscribers “face many of the same challenges that systems of 1,000 or fewer subscribers do in providing cable service.”⁸ Accordingly, the Commission extended badly needed relief to systems serving fewer than 15,000 subscribers owned by small cable companies serving a total of 400,000 or fewer subscribers.⁹

The administrative challenges facing smaller cable companies to gather, process, and report data are no different in the EEO context than in the rate context.

The Commission, therefore, should raise the exemption from the EEO outreach

⁶ For a summary of these efforts in the context of rate regulation, see *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration* 10 FCC Rcd. 7393, at 7401-7402 and 7420 (1995) (“*Small System Order*”); for special small cable leased access rules, see *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd. 5267 at 5331-5332, 5333 (1997) (“*Leased Access Proceeding*”).

⁷ *Small System Order* at ¶ 26.

⁸ *Small System Order* at ¶¶ 25-27.

⁹ *Id.* at ¶ 38.

requirements to cable companies serving fewer than 15,000 subscribers. Alternatively, the Commission should raise the exemption to cable employment units with ten or fewer full-time employees. Further, the Commission should streamline recordkeeping and reporting requirements and Form 395-A for these small companies. This will better allow small cable operators to comply with ongoing EEO obligations within the limits of their already-strained resources.

III. The relief requested by ACA is entirely consistent with the Second Circuit's holding in *United Church of Christ*

In *United Church of Christ*, the Second Circuit noted that an agency may change its policies if it has a rational, articulated explanation for its actions.¹⁰ As detailed above, there is ample evidence on the record to support the Commission changing its EEO rules to provide administrative relief to small cable businesses.

In its comments, NOW, *et. al.*, misconstrues the holding in *United Church of Christ* to support its position that raising the threshold to ten employees would not withstand judicial review.¹¹ The court in *United Church of Christ*, however, was confronted with justifications for a change in Commission rules that were “unsupported or inadequate on the record...and therefore...arbitrary and capricious.”¹² The Second Circuit could “find no evidence in the record” of the administrative burden on small stations. That is very different from the record in this proceeding. The comments of ACA and others in this proceeding, and the Commission's and Congress' consistent recognition of the burdens facing small cable companies supply well-supported and

¹⁰ *United Church of Christ* at 532-33.

¹¹ NOW, *et. al.*, *Comments*, MM Docket No. 98-204 (filed April 15, 2002) (“NOW Comments”) at 26-27.

¹² *United Church of Christ* at 533.

more than adequate evidence of the need for administrative relief for small cable companies.

IV. Section 634 of the Communications Act gives the Commission discretion to design recordkeeping, reporting, and outreach requirements

ACA requests that the Commission exercise its discretion under Section 634 of the Communications Act¹³ to provide appropriate relief from administrative burdens and costs for small cable companies. A plain reading of the statute shows Congress' intent to provide the Commission such discretion.

In Subsection (d)(3)(B) of Section 634, Congress explicitly provided that “[t]he Commission may amend [its] rules from time to time to the extent necessary to carry out the provisions of [Section 634].”¹⁴ Further, Subsection 634(d)(2) states that the outreach rules established by the Commission shall specify the terms under which a cable entity shall undertake outreach efforts “to the extent possible.”¹⁵

Despite this clear language, NOW *et. al.* argues that the Commission is not free to amend its rules and that Congress intended to place the full administrative burden of large cable companies on small, rural cable operators. The statute does not support this reading. Congress has explicitly legislated that the Commission may change its rules. Further, by using the words “to the extent possible,” Congress provided a safety valve that the Commission could use to provide relief to small cable businesses. As the Second Circuit noted in *United Church of Christ*, in a proceeding like this one where there is adequate evidence on the record to provide a rational, articulated explanation for a change in agency rules, the agency’s action will be upheld.

¹³ 47 U.S.C. § 554.

¹⁴ 47 U.S.C. § 554(d)(4).

V. Conclusion

ACA and its members fully support increasing diversity in the workplace. The issues raised by the parties in this proceeding do not suggest that small cable companies are a problem in terms of equal employment opportunity. Given the limited financial and administrative resources available to small cable companies and the availability of recruiting sources in smaller towns and rural America, the Commission should provide relief by (1) raising the exemption threshold for the EEO outreach requirements; (2) streamlining recordkeeping and reporting requirements under the proposed new rule; and (3) streamlining Form 395-A. As shown in ACA's Comments, these accommodations would benefit small cable companies without sacrificing congressional or Commission EEO policies.

Respectfully submitted,

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¹⁵ 47 U.S.C. § 554(d) [emphasis added].